

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE NETWORK COMMERCE INC.
SECURITIES LITIGATION

No. C01-0675L

ORDER GRANTING PLAINTIFFS
LEAVE TO FILE AN AMENDED
CLASS ACTION COMPLAINT

This matter comes before the Court on plaintiffs' "Motion for Leave to File an Amended Class Action Complaint for Violations of the Federal Securities Laws." Dkt. # 118. Plaintiffs seek to bring the underwriter defendants back into the case pursuant to the terms of a Tolling Agreement entered by the Court on February 25, 2002. Plaintiffs' proposed Second Consolidated Amended Class Action Complaint is also shorn of all allegations of fraud and adds allegations in support of plaintiffs' remaining claims under Sections 11 and 15 of the Securities Act of 1933, 15 U.S.C. § 77k(a) and § 77(o).

Pursuant to Fed. R. Civ. P. 15(a), leave to amend "shall be freely given when justice so requires." There is, therefore, a "strong policy in favor of allowing amendment" after "considering four factors: bad faith, undue delay, prejudice to the opposing party, and the futility of amendment." Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir. 1994). Although not couched in the language of Rule 15, defendant Dwayne Walker argues that it is futile to add allegations

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1 regarding undisclosed executive compensation paid to defendant Walker through the use of his
2 unvested stock options as collateral because the Court has already found that the September 28,
3 1999, loan amount did not exceed \$60,000.¹ Plaintiffs have alleged that defendants' affirmative
4 statements regarding executive compensation were false and misleading under Section 11. The
5 new allegations do not necessarily conflict with the Court's prior rulings regarding the amount
6 of the September 29, 1999, loan and may be relevant to the Section 11 claim. Defendant has not
7 shown that the proposed amendment would be futile.

8 There being no evidence of undue delay, bad faith, or prejudice, plaintiffs' motion
9 to amend is hereby GRANTED. Plaintiffs' shall, consistent with the limitations imposed by
10 Network Commerce, Inc.'s bankruptcy proceeding, file and serve within twenty days of the date
11 of this Order a signed amended complaint substantially in the form of Exhibit C to the
12 Declaration of Elizabeth A. Leland (Dkt. # 118).

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14 DATED this 25th day of October, 2005.

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17 Robert S. Lasnik
18 United States District Judge
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25 ¹ Defendant Walker raised two other arguments in opposition to plaintiffs' motion for leave to
26 amend (preservation of issues for appeal and Network Commerce, Inc.'s bankruptcy), neither of which
establish futility, bad faith, undue delay, or prejudice.